

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs September 26, 2006

STATE OF TENNESSEE v. DAVID L. MONROE, JR.

**Direct Appeal from the Criminal Court for Davidson County
No. 2004-B-1197 Cheryl Blackburn, Judge**

No. M2005-02750-CCA-R3-CD - Filed October 30, 2006

The defendant, David L. Monroe, Jr., appeals the trial court's revocation of his probation and reinstatement of his original sentence, arguing that the court abused its discretion in reinstating his sentence based on what he characterizes as relatively minor violations of the terms of his probation. Following our review, we affirm the trial court's revocation of the defendant's probation and reinstatement of his eight-year sentence for attempted aggravated sexual battery of a three-year-old child.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and J.C. McLIN, JJ., joined.

Jeffrey A. DeVasher, Assistant Public Defender (on appeal), and Willow Fort, Assistant Public Defender (at trial), for the appellant, David L. Monroe, Jr.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Angelita Dalton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

____ In May 2004, the Davidson County Grand Jury indicted the defendant on one count of rape of a child, a Class A felony, and one count of aggravated sexual battery, a Class B felony, based on his February 5, 2004, actions with a three-year-old child. On January 13, 2005, the defendant pled guilty to one count of attempted aggravated sexual battery, a Class C felony, in exchange for an eight-year sentence as a career offender, with one year to be served day-for-day and the balance on supervised probation. In accordance with the terms of the plea agreement, the rape count of the indictment was dismissed.

The prosecutor set forth the factual basis for the plea at the guilty plea hearing:

The victim is a young girl named [A.F.].¹ She was born in November of 2000. She is now four years old.

The defendant was friends with [the victim's] mother and father, and last February, that is February of 2000 [sic], the defendant was at [the victim's] home here in Nashville. The adults were listening to music. The defendant excused himself from the living room where the adults were. He went into -- he said he had to use the bathroom. He went into the bedroom where [the victim] was sleeping. He was gone for a number of minutes. The adults were curious about where he was. They went back into [the victim's] bedroom. The defendant was in the toddler bed with [the victim]. He was under the covers.

The first person through the door would state that the defendant's hand -- there appeared to be movement under the covers around [the victim's] mid-section.

[The victim] later told her mother that the defendant, David, put his hand inside her. She pointed to her genitals and said that he touched her down there.

Detective Brad Gibson later spoke to the defendant. The defendant said that he was checking the victim's diaper. He was asked why he didn't tell the victim's mother that the diaper was wet. He had no answer. He was asked if he had ever checked her diaper before. He had no answer. He admitted that she was able to speak and she could have told him if her diaper was wet. He admitted that his finger could have accidentally penet[rated] her genitals while he was checking her diaper.

Among the terms of his probation, the defendant was ordered to register as a sex offender, to inform his probation officer before changing his residence or employment, to follow all instructions given to him by his probation officer, and not have any contact with minor children other than his siblings.

On July 29, 2005, a probation violation warrant was issued alleging that the defendant had violated three terms of his probation. Specifically, the warrant alleged the defendant had changed his residence without informing his probation officer; had returned to his uncle's home, located beside a day care center, against the explicit instructions of his probation officer; and had engaged in contact with his uncle's three young grandchildren for a period of at least a month and half.

A probation violation hearing was held on October 28, 2005. The defendant's probation officer, Joyce Johnson, testified that when the defendant came under her supervision in March 2005 he revealed that he was living with his uncle, whose home was located next door to a day care center.

¹ In accordance with the policy of this court, we refer to the minor victim by her initials only.

She told him he would have to move immediately, but when she checked approximately three weeks later, she found that the defendant was still living at the residence. She stated that the defendant did not move out of the residence until “around April.” Johnson said that the defendant later moved from a residence on East Trinity Lane without either obtaining her prior approval or informing her within forty-eight hours of his move, which was in violation not only of the terms of his probation but also of the law governing registered sex offenders.

Finally, Johnson testified that the defendant had contact with minor children in direct violation of the special condition of his probation. She said that the defendant first revealed to his treatment provider and later to her that for at least a month and a half he had been going to his uncle’s house, where he had contact with his uncle’s three young grandchildren. According to the defendant’s treatment provider, the grandchildren were approximately four years old, two years old, and two months old, which was within the same age group as the victim.

On cross-examination, Johnson acknowledged that the defendant told her that he went to his uncle’s house to mow grass. She disputed, however, that the defendant paid for his sex offender treatment by performing such work, testifying that the defendant had told her “at different times that people helped him out.” She conceded the defendant had been evicted from the East Trinity Lane address but said it was because “[h]e would not keep a job.” She also conceded that the defendant eventually informed her of his move. She testified, however, that it was not until “much later on.”

The defendant testified that he was living with a friend at 721 Due West Avenue when he learned about the probation violation warrant. He said he had been “going over [to his uncle’s house] on the weekends” to help clean the house and yard in order to earn money for his treatment class. He stated that, had he been able to earn enough money elsewhere, he would not have worked at his uncle’s house. The defendant testified that he got a job two or three days before he was evicted from the East Trinity Lane residence, but the friends with whom he was living evicted him anyway because he owed back rent. He said he did not immediately inform his probation officer of his situation because he was homeless for a few days following his eviction and believed she would automatically violate him if she learned that he was homeless.

The defendant testified that the only job he had while on probation was at a car wash. He said it was difficult for him to find work and speculated that it was due to the nature of his offense and the fact that he “had a slow disability.” He said he had been diagnosed as borderline mentally retarded and had a hard time concentrating, remembering information, and finishing something once he started it. He promised that, if released from custody, he would never again go to his uncle’s house. In response to a question by the trial court, he explained that he had gone there, despite his probation officer’s direct instructions, because he needed to earn money. When the trial court asked what would prevent him from returning should he again need money, he replied that his family had since disowned him.

The defendant testified that he had turned himself in when he learned that a probation violation warrant had been issued for him. He said that while he was on probation, he had attended

all his classes, reported regularly to his probation officer, and paid all his fees. If released from custody, he intended to return to work at the car wash and also try to get a job at the “U-Haul place.” He stated that probation was “really important” to him because it gave him a chance “to better [his] life” and to “learn how to depend on [himself] instead of having to depend on other people.”

As an exhibit to the hearing, the defendant introduced a letter from his friends, Homer and Leena Maddin. In the letter, the couple expressed their love and support for the defendant, stating that the defendant, who “has the mind of a child,” was “like another son” to them, was honest, trustworthy, and would never harm a child in any way.

At the conclusion of the hearing, the trial court found that the defendant had violated a substantial condition of his probation by his contact with minor children. The trial court therefore revoked the defendant’s probation and ordered that he serve the remainder of his eight-year sentence in incarceration.

ANALYSIS

_____ The sole issue the defendant raises on appeal is whether the trial court erred in revoking his probation and reinstating his original sentence. He concedes that he violated the terms of his probation but argues that the trial court’s reinstatement of his entire original sentence was unduly harsh, given the circumstances of his violation, in which he had gone to his uncle’s house in order to earn money to pay for his treatment classes. He further argues that the reinstatement of the sentence does not serve the best interests of either himself or the public. The State responds by arguing that the trial court acted within its discretion in reinstating the defendant’s sentence based upon the serious nature of his violation. We agree with the State.

The trial court is expressly authorized by statute to reinstate a defendant’s original sentence upon a finding that the defendant has violated the terms of his or her probation. See Tenn. Code Ann. §§ 40-35-310, -311 (2003); State v. Hunter, 1 S.W.3d 643, 646 (Tenn. 1999). Upon a finding that a violation has occurred, the trial court may, in its discretion, either: (1) order incarceration; (2) order that the original entire probationary period begin anew; or (3) extend the probationary period by up to two years. State v. Eric D. Devaney, No. E2005-01986-CCA-R3-CD, 2006 WL 2373469, at *3 (Tenn. Crim. App. Aug. 17, 2006) (citing Hunter, 1 S.W.3d at 644; Tenn. Code Ann §§ 40-35-310; 40-35-311(e); 40-35-308(c) (2003)).

The revocation of probation lies within the sound discretion of the trial court. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991); State v. Stubblefield, 953 S.W.2d 223, 226 (Tenn. Crim. App. 1997); State v. Mitchell, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). To show an abuse of discretion in a probation revocation case, “a defendant must demonstrate ‘that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the conditions of probation has occurred.’” State v. Wall, 909 S.W.2d 8, 10 (Tenn. Crim. App. 1994) (quoting State v. Delp, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980)). The proof of a probation violation need not be established beyond a reasonable doubt, but it is sufficient if it allows the trial court to

make a conscientious and intelligent judgment. Harkins, 811 S.W.2d at 82 (citing State v. Milton, 673 S.W.2d 555, 557 (Tenn. Crim. App. 1984)). The trial court must also exercise a conscientious rather than arbitrary judgment when determining the disposition of a defendant's case upon a finding that he or she violated the terms of probation. Devaney, 2006 WL 2373469, at *4. We, therefore, review this issue for an abuse of discretion.

We find no abuse of discretion in the trial court's revocation of the defendant's probation and reinstatement of his original sentence in incarceration. A special condition of the defendant's probation, of which he was clearly informed, was that he avoid contact with minor children. His probation officer also specifically instructed him that he could not be at his uncle's home. Nonetheless, the defendant returned to the home, where he came in repeated contact with his uncle's three minor grandchildren who were in the same approximate age range of the victim of his attempted aggravated sexual battery offense. Under these circumstances, the trial court acted within its discretion in reinstating the defendant's original sentence.

CONCLUSION

_____ We conclude that the trial court acted within its discretion in revoking the defendant's probation and ordering that he serve his original sentence in incarceration. Accordingly, we affirm the judgment of the trial court.

ALAN E. GLENN, JUDGE